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RESPONSE TO THE
2004 REPORT OF THE
JUDICIAL JUSTICES COMPENSATION COMMISSION

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This response filed in the Legislature
with corresponding Notice of Motion
on February 14, 2005
by the Honourable Geoff Plant

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Response to the 2004 Report of the Judicial Justices Compensation Commission

This document supplements the corresponding motion by presenting the reasons for the rejection of, and substitution of provisions for, specific recommendations of the *Report of the Judicial Justices Compensation Commission* (the "JJC Commission Report").

The Judicial Justices Compensation Commission is an independent commission mandated by the *Judicial Compensation Act* to make recommendations respecting the remuneration, allowances and benefits of Judicial Justices of the Peace. The current JJC Commission Report covers the time period from January1, 2005 to the end of fiscal year 2007/2008.

The process for setting judicial compensation is contained in the *Judicial Compensation Act*. The Legislative Assembly may reject recommendations of a compensation commission as being unfair or unreasonable. Recommendations of this JJC Commission Report which are not specifically rejected by the Legislative Assembly within the time frame set out in the *Act* go into effect beginning on January 1, 2005.

The JJC Commission Report was tabled in the Legislative Assembly on October 7, 2004, and, further to section 6(1)(c) of the *Judicial Compensation Act*, has been tabled again today, February 9, 2005.

Government must consider the JJC Commission Report in the context of judicial independence and its responsibility to deal with matters of public interest broadly understood. This includes responsible fiscal management for all of government, and the efficient operation of all parts of government, balancing competing demands and interests.

As set out in the motion accompanying this Response, four of the recommendations of the JJC Commission Report are rejected and substitutions made. The remaining recommendations are accepted.

Before considering the JJC Commission Report, it is important to set out the larger legal and historical context. The first part of this document describes the concept of judicial independence, provides an overview of the functions and duties of Judicial Justices and sets out the relevant legislative provisions. Individual recommendations of the JJC Commission Report are then presented, together with the reasons for rejecting, and making substitutions for, specific recommendations.

A. LEGAL AND HISTORICAL CONTEXT

Independence of the Judiciary

It is a fundamental principle of the Canadian Constitution that the courts must be independent, both from government and from private individuals. The Government of British Columbia reemphasizes its respect for and its commitment to the principle of judicial independence, both in its substance and in its spirit.

The historical foundations and the fundamental sources of the principle of judicial independence in the Canadian Constitution were examined at length by the Supreme Court of Canada in the decisions of *Valente v. The Queen* (1985) and *Beauregard v. Canada*, (1986). The discussion of these aspects of this principle continued in the more recent decision in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* ("*Provincial Court Judges Reference*") (1997), a case which is particularly significant with respect to the issue of judicial compensation commissions.

These and other decisions of the Supreme Court of Canada describe how section 11(d) of the *Charter of Rights and Freedoms* and sections 96 to 100 of the *Constitution Act, 1867* have incorporated the principle of judicial independence into this country's *written* constitution. Section 11(d) of the *Charter* specifically states:

> **11.** Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

It was first discussed in the *Beauregard* decision that the principle of judicial independence, which has for centuries been a cornerstone of the constitutional system of the United Kingdom, was transferred to Canada by the language of the preamble to the *Constitution Act, 1867*, which states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". The judgment of Supreme Court of Canada Chief Justice Lamer in *Provincial Court Judges Reference* affirmed that this reference supports the *unwritten* principle of judicial independence which runs through our Constitution:

> Notwithstanding the presence of s.11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an <u>unwritten</u> constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins

> can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the *Constitution Act, 1867.*

The importance to our society of this basic principle of our Constitution has been described many times, but perhaps cannot be better stated than it was by Mr. Justice Strayer in a 1994 decision of the Federal Court of Canada, *Gratton v. Canada (Judicial Council):*

> [The] independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour.

The Supreme Court of Canada has described how judicial independence is comprised of three essential conditions: security of tenure, financial security and administrative independence. Each of these components has been the subject of careful analysis by that Court.

The *Provincial Court Judges Reference* decision affirmed, as a constitutional requirement for financial security, that judicial remuneration must not become the subject of negotiation between the judiciary and the government. Instead it must be established through a process which incorporates an independent, objective and effective judicial compensation commission that reports and makes recommendations on judicial remuneration. The remuneration of Judicial Justices, who are officers of the court performing judicial functions, is established through just such a process.

Judicial Justices

Historically there were several groups of justices of the peace in British Columbia, all appointed under the *Provincial Court Act.* One of these groups was the Sitting Justices of the Peace, court officers who presided over traffic violation, municipal bylaw and small claims payment matters. Another group of justices of the peace issued search warrants and performed judicial interim release matters, as well as undertaking administrative functions.

In his decision of October 2000, (*In the Matter of the Independence of the Provincial Court of British Columbia Justices of the Peace),* Mr. Justice Sigurdson of the British Columbia Supreme Court held that Sitting Justices of the Peace carried out functions for which judicial independence was required. He also held that justices of the peace under the *Provincial Court Act,* as it then stood, were not provided with such independence.

In April 2001, the Judicial Justice position was created by amendments to the *Provincial Court Act.* Judicial Justices were provided with the hallmarks of judicial independence so that they could perform functions of the kind which Mr. Justice Sigurdson had examined in his decision. The legislation ensured security of tenure by providing that Judicial Justices hold office during good behaviour. Financial security was ensured by providing for a committee process to set an appropriate level of compensation for this new Judicial Justice position.

In April 2001, another decision of the British Columbia Supreme Court, *R. v. Do,* held that the issuing of search warrants is a judicial function that cannot be carried out by staff justices of the peace of Court Services Branch as these justices do not enjoy sufficient judicial independence. As a result, it was determined that justices of the peace who staff the Judicial Justice Centre at 222 Main Street in Vancouver, and who issue search warrants and perform judicial interim release duties, would be appointed as Judicial Justices.

Judicial Justices are appointed justices of the peace further to section 30 of the *Provincial Court Act,* and are designated as Judicial Justices further to section 30.1 of that Act. As of February 3, 2005, there are 29 full-time, and 2 part-time Judicial Justices in British Columbia. Judicial Justices are supervised by the Chief Judge of the Provincial Court of British Columbia.

Relevant Provisions of the *Judicial Compensation Act*

The *Judicial Compensation Act* requires the Judicial Justices Compensation Commission to consider several factors before making recommendations with respect to the remuneration, allowances and benefits of Judicial Justices. Section 5(5) of that *Act* says:

> **5.** (5) In preparing a report, a commission must consider all of the following:
>
> (a) the current financial position of the government;
>
> (b) the need to provide reasonable compensation to the [...] judicial justices;

(c) the need to maintain a strong court by attracting qualified applicants;
(d) the laws of British Columbia;
(e) any matter the commission considers relevant.

In accordance with section 3 of the *Act*, the present Judicial Justices Compensation Commission was appointed on March 1, 2004. Its members were Chair Deborah K. Lovett, Q.C., John D. Waddell, Q.C. and Gillian P. Wallace, Q.C.

The Commission's responsibility, pursuant to section 5(1) of the *Act*, was to report on and make recommendations with respect to remuneration, allowances and benefits of Judicial Justices for each of the following three fiscal years, that is, 2005-2006, 2006-2007 and 2007-2008. Further to the transition provision in section in section 26(2) of the *Act*, this Commission was also required to make recommendations for the first three months of 2005.

The *Act*, section 6(2) provides that the Legislative Assembly may, by a resolution passed within 28 sitting days after the date on which the report is laid before the Legislative Assembly (in this case, the resolution must be passed by the 28th sitting day after February 9, 2005):

6. (2)(a) reject one or more of the recommendations made in the report as being unfair or unreasonable, and
(b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

The *Judicial Compensation Act* specifies further that if a recommendation is not rejected by the Legislative Assembly within the time limit, the Judicial Justices are entitled to receive the remuneration, allowances and benefits proposed by that recommendation beginning, with respect to this JJC Commission Report, on January 1, 2005. If the Legislative Assembly does resolve to reject a recommendation, then the substituted remuneration, allowance or benefit goes into effect beginning on January 1, 2005.

B. COMMISSION REPORT AND RESPONSE

COMMISSION SALARY RECOMMENDATIONS

The Commission made the following recommendations respecting the salaries of Judicial Justices:

1. Increase for January 2005 - March 31, 2005 from $73,872 to $75,600;

2. Maintain increased salary of $75,600 for 2005/06;

3. Increase for 2006/07 of 2 percent of $75, 600;

4. Increase for 2007/08 of additional 2 percent.

Response to Commission Salary Recommendations

The recommendations for salary increases for 2004/05 and 2005/06 are rejected as unreasonable and unfair. (Recommendations 1 and 2).

The recommendations for salary increases for 2006/07 and 2007/08 are accepted. (Recommendations 3 and 4). This will result in a salary for Judicial Justices in 2006/07 of $75,600 plus 2 percent, and an additional salary increase of 2 percent for 2007/08.

Substitutions for Recommendations 1 and 2 and Reasons

Judicial Justice salaries will be kept at the current level of $73,872 from January 1, 2005 until March 31, 2006.

The recommended salary increases are rejected, and the zero increases substituted for the time in question, for the following reasons.

First, this response is consistent with the underlying reasoning of the Commission, which noted:

> "...JJPs [Judicial Justices] are not public servants, [but] they are part of the broader public sector and the salaries of JJPs are paid from the public purse" [Report, p. 27].

The public sector compensation policy, an across-the-board measure affecting substantially every person who is paid from the public purse, mandates zero increases for the time in question (until the end of fiscal 2005/06).

Moreover, this response will result in judicial justices' salaries reaching the same end point recommended by the Commission, ($75,600 plus two increases of 2 percent per year). It would be unfair to contravene the public sector compensation policy and provide judicial justices with salary increases before 2006/07. There are no compelling reasons that would justify such inequity.

The current judicial justice salaries are reasonable. This is consistent with the underlying reasoning of the Commission which, first, did not find evidence of any inability to attract qualified applicants and second, noted that the jurisdiction of Judicial Justices has been "markedly reduced since the current salary levels were set". (JJC Commission Report, p. 27).

Finally, the Commission found that reasonable comparisons can be drawn between the work of Judicial Justices and the work of some administrative tribunals that the government classifies under Treasury Board Directive 3/04 as group 1 tribunals. (These include, for example, Mental Health Review Panels and the Parole Board). The current Judicial Justice salary falls within the upper range of remuneration that may be paid to group 1 tribunal members ($66,150 to $75,600).

Under these circumstances, and in light of the public sector compensation policy that applies to substantially all who are paid from the public purse, it would be unfair and unreasonable to provide Judicial Justices with salary increases before 2006/07.

COMMISSION RECOMMENDATIONS RESPECTING BENEFITS

The Commission made the following recommendations respecting benefits for Judicial Justices:

5. 30 days vacation for all Judicial Justices;

6. Development of a senior Judicial Justice program modelled on the senior judge program for Provincial Court Judges;

7. Annual professional development allowance of a maximum of $500 per year per Judicial Justice;

8. Administration of the professional development allowance: The Chief Judge to have the discretion to approve or disapprove all expenditures of the allowance and guidelines to be put in place with respect to the appropriate use of the funds.

Response to Commission Benefits Recommendations

The government accepts the Commission's recommendations respecting vacation days and the annual professional development allowance. (*Recommendations 5 and 7 above*).

The recommendation for a senior Judicial Justice program is rejected. (*Recommendation 6 above*).

The recommendation that the Chief Judge have discretion to approve or disapprove all expenditures of the professional development allowance is rejected. (*Recommendation 8 above*).

Substitution for Recommendation 6 and Reasons:

There will not be a senior Judicial Justices program.

The senior judges program for Provincial Court Judges serves to help retain the expertise of senior judges who might otherwise retire earlier than the mandatory retirement age of 70. Provincial Court Judges adjudicate complex and varied cases.

The situation for Judicial Justices is not analogous. Their retirement age is 65. Also, their jurisdiction is substantially more limited than Provincial Court Judges, and has been further constrained since 2003. Therefore, the same degree of benefits that are realized from the Provincial Court Judge program would not be realized in a program for senior Judicial Justices. There are no compelling arguments in favour of developing such a program at this time.

Substitution for Recommendation 8 and Reasons:

Subject to the discretion of the Chief Judge, and administered through the Office of the Chief Judge, the professional development allowance may be used to reimburse following expenses incurred by a Judicial Justice for professional development related to the duties of a Judicial Justice:

a. **Books, periodicals and subscriptions;**
b. **Computer software;**
c. **Internet access fees;**
d. **Professional association membership dues;**
e. **Courses, seminars and conferences, including travel and expenses incidental to attendance.**

This professional development allowance regime is consistent with the regime outlined for Provincial Court Judges in the Response to the 2004 Judges Compensation Commission. It will enable Judicial Justices to be reimbursed for expenses relevant to the pursuit of professional development, based on a standard approach to these expenses.

COMMISSION COST RECOMMENDATIONS

The Commission recommended that government reimburse the Judicial Justice Association for its costs of participating in the Commission process to a total of $11,500.

This recommendation is accepted.